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84-1057

Office Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

OPHUS A. HUTCHERSON, JR.
W. H. HOUSEMAN
A. W. LYNCH
BRUCE HIGGINS
O. K. TENCH
KENNETH D. CAMPBELL
ALLEN PERDUE
JAMES BOUSEMAN
JACKSON JEWELL
J. CARL POINDEXTER

and

A. DALE BROWN
RICHARD O. ANGLE
HAROLD E. PALMER
PAUL SMITH
JOSEPH FORDHAM
ROGER FLOWERS
DICK ROBERTSON

Petitioners,

v.

BOARD OF SUPERVISORS OF
FRANLIN COUNTY, VIRGINIA;
TOWN OF ROCKY MOUNT, VIRGINIA

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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34

I. QUESTIONS PRESENTED

1. Was the decision of the court below clearly correct?

2. Is there a conflict in the circuits?

II. TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. THE DECISION BELOW IS CLEARLY CORRECT 3

1. Two recent decisions of this Court, construing the Tax Injunction Act of 1937 [28 U.S.C. §1341], require that this action be dismissed for want of jurisdiction 3

2. The Rule of Fair Assessment In Real Estate v. McNary, 454 U.S. 100 (1981), also requires that this case be dismissed . . . 8

3. The statutory remedy provided by former §58-1145 of the Code of Virginia is a plain, speedy, and efficient remedy 10

4. The plaintiffs' action is frivolous, unreasonable, and without foundation . . . 15

B. THERE IS NO CONFLICT OF DECISION WITHIN THE CIRCUITS 22

CONCLUSION 27

III. TABLE OF AUTHORITIES

CASE	PAGE
Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980)	24, 25
Ayers v. Polk County, Georgia, 697 F.2d 1375 (11th Cir. 1983) . . .	26
Bland v. McHann, 463 F.2d 21 (5th Cir. 1972)	23
California v. Grace Brethren Church, 457 U.S. 393, 73 L.Ed.2d 93 (1982)	2, 4, 5, 6, 17, 22 25, 26
Chesapeake & Potomac Telephone Company v. City of Newport News, 194 Va. 409, 73 S.E.2d 394 (1952)	14
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	15, 16, 22
Dawson v. Childs, 665 F.2d 705 (5th Cir. 1982)	25
Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981)	2, 7, 8, 9, 10, 18 20, 21, 22, 25, 26, 27
Fulton Market Cold Storage v. Cullerton, 582 F.2d 1071 (7th Cir. 1978)	10

Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969) 24, 25, 27

Hawaiian Telephone Company v. State Department of Labor, 691 F.2d 905 (9th Cir. 1982) 26

Hutcherson, et al. v. Board of Supervisors, et al., 742 F.2d 142 (4th Cir. 1984) 18, 19, 20

Moten v. Lambert, 508 F.Supp. 367 (N.D. Miss 1981) 22, 23, 24, 25, 26

Northwood Apartments v. La Valley, 673 F.2d 159 (6th Cir. 1982) 26

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 1, 6, 12 16, 17, 25

Trescon Industries, Inc. v. Cohen, 664 F.2d 929 (4th Cir. 1981). . 12

Todd v. County of Elizabeth City, 191 Va. 52, 60 S.E.2d 23 (1950) . . . 14, 17

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 12

Werch v. City of Berlin, 673 F.2d 192 (7th Cir. 1982) 20, 21

STATUTES

28 U.S.C. §1341 . . . . . 1, 3, 4, 6, 7, 11

42 U.S.C. §1983 . . . . . 1, 8, 10
18, 20,
21

42 U.S.C. §2000a 15

Code of Virginia §58-617.2 . . . . . 1, 15,
17, 22,
26

Code of Virginia §58-1145 . . . . . 10, 11,
13, 14,
17

Code of Virginia §58.1-3984 . . . . . 11, 17

IV. SUMMARY OF ARGUMENT

Plaintiffs filed their case in the United Stated District Court for the Western District of Virginia in May 1982 and amended their complaint in July 1982; the amended complaint asked for a declaratory judgment that former §58-617.2 of the Code of Virginia was unconstitutional and an injunction ordering the defendant County Board of Supervisors to extend the County's utility tax to the citizens of the defendant Town. In addition, the amended complaint asked for both compensatory and punitive damages pursuant to 42 U.S.C. §1983.

The Tax Injunction Act of 1937, 28 U.S.C. §1341, and the decisions of this Court interpreting this act, make it clear that a federal district court may not entertain the plaintiffs' action. In Rosewell v. LaSalle National Bank, infra, this court held that the "plain, speedy and efficient" remedy of the

statute means that the state court remedy must meet certain procedural criteria. The state court remedy must provide the plaintiffs a forum in which to present their constitutional arguments against the disputed tax. Virginia has such a statute, and under this statute all of the plaintiffs' constitutional arguments may be fully expounded.

Well over a month before plaintiffs filed their amended complaint, this court decided California v. Grace Brethren Church, infra, in which the Court held that the Tax Injunction Act barred federal jurisdiction of suits asking for declaratory relief, as well as injunctive relief, against state tax laws. In Fair Assessment in Real Estate v. McNary, infra, this Court held that the principle of comity prevented a district court from exercising jurisdiction over a §1983 action challenging the validity of a state tax system.

In spite of the decisions of this court, plaintiffs filed their suit in federal court.

The decisions of both the district court and the United States Court of Appeals for the Fourth Circuit were correct, since the district court could not entertain plaintiffs' action. Plaintiffs have continued to litigate this matter, although it is frivolous, unreasonable, and without foundation.

V. ARGUMENT

A. THE DECISION BELOW IS CLEARLY CORRECT.

1. Two recent decisions of this Court, construing the Tax Injunction Act of 1937 [28 U.S.C. §1341], require that this action be dismissed for want of jurisdiction.

The Tax Injunction Act of 1937 [28 U.S.C. §1341] states as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain,

speedy and efficient remedy may be had in the courts of such State."

On June 18, 1982, just eight days after defendant Town of Rocky Mount filed its motion to dismiss, this Court decided California v. Grace Brethren Church, 457 U.S. 393, 73 L.Ed.2d 93 (1982), which held as follows:

"The Tax Injunction Act states simply that the district courts 'shall not enjoin, suspend or restrain the ... collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.' It is plain from this language that the Tax Injunction Act prohibits a federal district court, in most circumstances, from issuing an injunction enjoining the collection of state taxes. Although this Court once reserved the question, we now conclude that the Act also prohibits

> a district court from issuing a declaratory judgment holding state tax laws unconstitutional." Grace Brethren Church, supra, 73 L.Ed.2d at 106; emphasis added.

Plaintiffs thus seek to do what is expressly prohibited. They seek an injunction to compel the collection of a state tax, and a declaratory judgment holding a state tax law to be unconstitutional. The amended complaint prays

> "[t]hat the Court determine and declare that the exemption of the town's citizens and school patrons from the legal responsibility to pay the county's school-supporting utility tax on the same basis as is required of plaintiffs' class of county citizens, as provided in Section 58-617.2 of the Virginia Code, makes that provision of the state statute unconstitutional...."

In Grace Brethren Church, supra, the Court relied heavily on Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981), a case in which this Court considered the meaning of the words "plain, speedy and efficient" in the Tax Injunction Act. The Court also discussed the purpose of the Tax Injunction Act as follows:

> "The statute 'has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.' Tully v. Griffin, Inc., supra, at 73. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local

concern as the collection of taxes." Rosewell, supra at 522; emphasis added.

Plaintiffs suggest that the justification for limiting federal interference into matters involving questions of state tax law is to prevent disruption of the flow of state tax revenues into a state's treasury, and that since they are seeking to compel the citizens of the defendant Town to pay Franklin County's utility tax in the same manner as the county citizens, §1341 presents no bar to the exercise of federal jurisdiction. [Petition 11] This reasoning is unsound, for the justification for the act goes beyond a concern over the integrity of state tax revenues. The act rests on principles of equity and comity and reflects a historical reluctance on the part of federal courts to interfere with state tax administration. Fair Assessment in Real Estate v. McNary, infra.

2. The Rule of Fair Assessment In Real Estate v. McNary, 454 U.S. 100 (1981), also requires that this case be dismissed.

In the case at bar plaintiffs have brought their action under 42 U.S.C. §1983. Paragraph 1 of the amended complaint states as follows:

> "This action arises under the Constitution and laws of the United States, viz., Amendment Fourteen, Section 1, and 28 U.S.C. 1331, 2201, and 42 U.S.C. 1983, and is brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure."

Plaintiffs are also seeking damages. The amended complaint asks that the court order:

> "[t]hat the Defendants shall pay to each member of Plaintiffs' class a sum in damages equal to the

> difference between the utility taxes each has paid and those each would habe [sic] paid had the county's utility tax been collected heretofore and henceforth also from the town's inhabitants...."

The amended complaint also asks the court to order that "the County Board of Supervisors shall pay punitive damages to each member of Plaintiffs' class in the additional amount of 100% of the actual damages aforesaid; as authorized by 42 U.S.C. 1983, for violations of the civil rights of the Plaintiffs...."

On December 1, 1981, this Court decided Fair Assessment in Real Estate v. McNary, supra, which disposes of the plaintiffs' damage claims:

> "...[t]he Tax Injunction Act and our comity cases have thus far barred federal courts from granting injunctive and declaratory relief in state tax cases.

> Because we decide today that the principle of comity bars federal courts from granting damages relief in such cases, we do not decide whether the Act, standing alone, would require such a result." McNary, supra, 70 L.Ed. at 277, 278; emphasis added.

The Court in McNary held "that taxpayers are barred by the principle of comity from asserting §1983 actions against the validity of state tax systems in federal courts." McNary, supra, 70 L.Ed. at 283. Fulton Market Cold Storage v. Cullerton, 582 F.2d 1071 (7th Cir. 1978), cited by the plaintiffs for the proposition that 42 U.S.C. §1983 requires that their complaint be heard on the merits, is no longer good law in the wake of McNary.

3. The statutory remedy provided by former §58-1145 of the Code of Virginia is a

plain, speedy, and efficient remedy.[1]

The Tax Injunction Act [28 U.S.C. §1341] essentially commands the federal courts not to assume jurisdiction of cases in which the resolution may depend upon an interpretation of

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[1] Former section 58-1145 has been repealed and replaced by section 58.1-3984 of the Code of Virginia, effective January 1, 1985, which reads in part as follows:

> "Any person assessed with local taxes, aggrieved by any such assessment, may, unless otherwise specially provided by law, within three years from the last day of the tax year for which any such assessment is made, apply for relief to the circuit court of the county or city wherein such assessment was made. The application shall be before the court when it is filed in the clerk's office. In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal, but it shall not be necessary for the taxpayer to show that intentional, systematic and wilful discrimination has been made. The proceedings shall be conducted as an action at law before the court, sitting without a jury. The county or city attorney, or if none, the Commonwealth's attorney, shall defend the application"

It is thought that case law decided under the old statute is still applicable.

state tax law "where a plain, speedy and efficient remedy may be had in the courts of such State". If there is no "plain, speedy and efficient" remedy available in the state courts, then, and only then, may the federal courts assume jurisdiction over state tax cases. Strescon Industries, Inc. v. Cohen, 644 F.2d 929 (4th Cir. 1981).

This Court in Rosewell, supra, discussed the meaning of the "plain, speedy and efficient remedy" exception and concluded that this exception "appears to require a state court remedy that meets certain minimal procedural criteria". Rosewell, supra, at 512; emphasis in original. Examining the treatment accorded the exception to §1341, the Rosewell Court looked at Tully v. Griffin, Inc., 429 U.S. 68 (1976), in which the Court described the general meaning of the exception as an inquiry into whether state law provided a "plain, speedy and efficient" way for the taxpayer to argue constitutional claims while at the same time reserving the right to challenge the

amount of tax due.

Former section 58-1145 of the Code of Virginia was the statutory remedy for aggrieved taxpayers at the time of the filing of this suit, and it is in part as follows:

> "Any person assessed with county or city levies or other local taxes, aggrieved by any such assessment, may, unless otherwise specially provided by law, within three years from the last day of the tax year for which any such assessment is made, apply for relief to the circuit court of the county or any city court of record of the city wherein such assessment was made. In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or that

> the assessment is otherwise invalid or illegal, but it shall not be necessary for the taxpayer to show that intentional, systematic and wilful discrimination has been made...."[Emphasis added]

Under former §58-1145 all of the plaintiffs' constitutional claims could be fully expounded. Todd v. County of Elizabeth City, 191 Va. 52, 60 S.E.2d 23 (1950). In Chesapeake & Potomac Telephone Company v. City of Newport News, 194 Va. 409, 73 S.E.2d 394 (1952), the Supreme Court of Virginia stated as follows:

> "Relief under these statutes is not confined to the correction of an assessment which is merely erroneous. They embrace also levies and assessments claimed to be unconstitutional, illegal and void." City of Newport News, supra at 413; emphasis added.

Using this statute, plaintiffs could have challenged the constitutionality of §58-617.2 of the Code of Virginia in the Circuit Court of Franklin County, Virginia, but they chose not to do so.

4. The plaintiffs' action is frivolous, unreasonable, and without foundation.

In Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the Supreme Court enunciated the standard to be applied involving Title VII of the 1964 Civil Rights Act [42 U.S.C. §2000a, et seq.]:

> "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co., supra at 421; emphasis added.

This Court thus made it clear that bad faith is not a necessary ingredient in awarding counsel fees.

The only remaining inquiry is whether plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith". Christiansburg Garment, supra at 421. The following considerations bear upon this issue:

1. The suit prayed for injunctive relief on an issue of state taxation, and that relief has been barred by the Tax Injunction Act, 28 U.S.C. §1341, since 1937.

2. Plaintiffs' case was filed on May 25, 1982. Over a year earlier, on March 24, 1981, the Supreme Court in Rosewell v. LaSalle National Bank, supra, had expressly stated that:

> "[t]he Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of

> substantive federal claims from the federal district courts to the state courts, as long as state court procedures were 'plain, speedy and efficient' and final review of the substantive federal claim could be obtained in this Court." Rosewell, supra at 515.

3. Virginia has had throughout the litigation a "plain, speedy, and efficient" remedy under §58-1145 of the Code of Virginia, the predecessor to present §58.1-3984 of the Code of Virginia, and under the statute all of plaintiffs' constitutional claims may be fully expounded. Todd v. County of Elizabeth City, 191 Va. 52, 60 S.E.2d 23 (1950).

4. In Grace Brethren Church, supra, decided on June 6, 1982, which was well over one month before plaintiffs filed their amended complaint seeking to invalidate as unconstitutional former §58-617.2 of the Code of Virginia, this Court ruled that such

declaratory and injunctive relief was barred by the Tax Injunction Act, 28 U.S.C. §1341.

5. Finally, in McNary, supra, decided on December 1, 1981, which was well over seven months before plaintiffs filed their amended complaint asking for damages, this Court made it clear that a suit for damages under 42 U.S.C. §1983, challenging the validity of state tax systems, would not lie in federal court on the grounds of comity.

The Court below said as follows:

> "When plaintiffs initiated this action, the law was settled both by statute and decision that a federal court could not entertain such a suit for injunctive relief unless no plain, speedy and efficient state court remedy existed. McNary precluded a suit for damages. Any doubt that an action for discretionary declaratory relief

could be maintained after Great Lakes Dredge & Dock Co. v. Hoffman, 319 U.S 393 (1943), was dispelled one month after the complaint was filed in this case by the Supreme Court in Grace Brethren Church which decided that declaratory relief was simply not available because of 28 U.S.C. §1341. Following that decision, however, the plaintiffs amended their complaint to ask for more, rather than less, declaratory relief. And so the case was when it came on for hearing.

"In light of the settled principles of law existing before the filing of this action and handed down during the action, all before the hearing in the district court, we conclude that plaintiffs' suit is meritless within the meaning of Christiansburg Garment Co., in that it is unreasonable or groundless and that the plaintiffs continued to

litigate after it clearly became so. Christiansburg Garment, Co., at 422." Hutcherson, et al. v. Board of Supervisors of Franklin County, et al., 742 F.2d 142, 146 (4th Cir. 1984).

In Werch v. City of Berlin, 673 F.2d 192 (7th Cir. 1982), plaintiff filed a §1983 action against the City of Berlin, Wisconsin, and many town officials, including the city tax assessor. Werch alleged that defendants had denied him equal protection of the laws under the Fourteenth Amendment by levying personal property taxes on his corn combines when other similarly situated residents of the City of Berlin were not so taxed. The District Court granted defendants' motions to dismiss and awarded attorney's fees, and the Seventh Circuit affirmed. The District Court made these rulings in May and July of 1981, and arguments on appeal were heard before the Seventh Circuit in February, 1982. During the interim the Supreme Court decided McNary, supra. The decision of plaintiff Werch to

proceed with his appeal in the face of McNary impressed the Seventh Circuit in Werch that the plaintiff's case was indeed frivolous. The Court stated as follows:

> "If we were to assume--which we do not--that there were any grounds for urging reversal of the district court's dismissal of Werch's complaint and assessment of attorney's fees when Werch filed his notice of appeal, those grounds were certainly abrogated by the Supreme Court's intervening decision in Fair Assessment In Real Estate Assoc., Inc. v. McNary, ___ U.S. ___, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). Werch continued to litigate this appeal after it clearly became frivolous, unreasonable, and groundless." Werch, supra at 196.

The plaintiffs filed a §1983 action, including a claim for damages, against the

validity of former §58-617.2 of the Code of Virginia exempting the Town of Rocky Mount from Franklin County's utility tax. To file such a suit on May 25, 1982, in the face of this Court's decision in McNary the previous December 1st, and to press forward with the suit in the face of this Court's decision in Grace Brethren Church in June 1982, can be described only as "frivolous, unreasonable, or without foundation", within the meaning of Christiansburg Garment, supra.

B. THERE IS NO CONFLICT OF DECISION WITHIN THE CIRCUITS.

Plaintiffs quote the following paragraph from Moton v. Lambert, 508 F.Supp. 367 (N.D. Miss 1981) in their petition:

> "It has long been established by the Fifth Circuit, however, that §1341 does not apply to suits wherein the requested remedy is the collection of additional taxes and not the

enjoining or suspension of taxes. See Hargrave v. McKinney, 413 F.2d 320 (5 Cir. 1969); Bland v. McHann, 463 F.2d 21 (5 Cir. 1972); Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301, 1304 (5 Cir. 1980). Since plaintiffs demand that taxes be collected and not enjoined, it is quite clear that §1341 does not operate to bar this action." Moton, supra at 368.

The implication of Moton is that "enjoin" means the same as "restrain", and operates only to forbid an assessment, levy or collection, but "enjoin" also has a well-recognized mandatory meaning. The word is used in precisely this mandatory sense in paragraph six of the prayer of plaintiffs' amended complaint:

"That accordingly the court issue its order enjoining the County Board of Supervisors to extend the

> county's utility tax to and collect it from the inhabitants of the town on the same basis as it applies to the inhabitants of the county at large (Plaintiffs' class)...."

The Court in Moton, supra, relied upon Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980) and Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969). Appling, without discussion, relies upon Hargrave, in which the court made the following statement about §1341:

> "Encroachments on the federal judiciary's power to vindicate rights allegedly guaranteed by the Constitution must be construed narrowly." Hargrave, supra at 326.

The court accordingly held that §1341 did not apply to a suit "to require the collection of taxes." Ibid.

The criteria and predicates of Hargrave, supra, cannot survive McNary, supra, Rosewell, supra, and Grace Brethren Church, supra. Indeed, it is questionable whether Hargrave and Appling, supra, remain authoritative in the Fifth Circuit. The holding of Hargrave that §1341 must be construed narrowly may be contrasted with the following statement in Dawson v. Childs, 665 F.2d 705 (5th Cir. 1982):

> "The concept that section 1341 is not a narrow statute aimed only at injunctive interference with tax collection, but is rather a broad restriction on federal jurisdiction in suits that impede state tax administration, has continued to gain credence in the federal courts." Dawson, supra at 709.

Moton, supra, Appling and Hargrave all were filed as §1983 civil rights actions. Each of these cases antedates this Court's decision in McNary. The following cases are

illustrative of the treatment accorded §1983 actions challenging state tax laws since the McNary decision: Ayers v. Polk County, Georgia, 697 F.2d 1375 (11th Cir. 1983) (judgment of dismissal of §1983 action affirmed on appeal); Hawaiian Telephone Company v. State Department of Labor, 691 F.2d 905 (9th Cir. 1982) (dismissal of §1983 action affirmed on basis of Tax Injunction Act and principle of comity); Northwood Apartments v. La Valley, 673 F.2d 159 (6th Cir. 1982) (judgment of dismissal affirmed on appeal after reconsideration in light of McNary).

In addition, Moton, supra, was decided prior to the decision of this Court in Grace Brethren Church, supra. The decision in Moton did not require the district judge in that case to hold a Mississippi taxing statute unconstitutional, contrary to the case at bar, where the district court was asked to void former §58-617.2 of the Virginia Code. Finally, Moton is the decision of a district

court. Even if it could be maintained that "enjoin" means only the same as "restrain" within the context of the Tax Injunction Act, a conflict in the circuits is not created by the conflicting decisions of a district court and a circuit court. Although Hargrave, supra, may have created a conflict at one time, any suggestion of its soundness was disspelled when this Court decided McNary, supra.

V. CONCLUSION

The defendant Town of Rocky Mount respectfully requests this Court to deny the writ of certiorari.

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